

No. 49882-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ADRIAN TROY ABRAM III,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON  
FOR THE COUNTY OF PIERCE

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BRIEF OF APPELLANT

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## A. INTRODUCTION

When Adrian Abram was threatened by a man with a gun at a grocery store near his house, he fled the parking lot with his girlfriend and young son in the car. Not looking behind him while fleeing, he failed to recognize that he was being followed by police, and not the man who had threatened his life.

Mr. Abram was charged with attempting to elude a police vehicle. At trial, he disputed the officers' description of his speed and manner of driving. The court erroneously credited police officer testimony by giving an instruction on expert witness testimony, despite the fact that the police were not qualified as expert witnesses.

The court further erred in admitting Mr. Abram's misdemeanor warrant to show motive for attempting to elude without any evidence he knew of this warrant. Finally, the court erred in allowing the arresting officer's impermissible comment on Mr. Abram's right to remain silent, in addition to admitting inadmissible hearsay. These errors deprived Mr. Abram of his right to a fair trial.

**B. ASSIGNMENTS OF ERROR**

1. The court erroneously instructed the jury on expert witness testimony when the police officers were never qualified as expert witnesses.
2. The trial court erroneously admitted evidence of Mr. Abram's misdemeanor warrant.
3. The State impermissibly elicited testimony that commented on Mr. Abram's right to remain silent.
4. The trial court erroneously allowed officers to present inadmissible hearsay.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Mr. Abram is entitled to jury instructions that correctly state the law and do not mislead the jury. When the trial court granted the prosecution's request to include a jury instruction on expert witness testimony over objection by the defense, and the police officers had not been qualified as expert witnesses, did this violate Mr. Abram's right to a fair trial?
2. ER 404 (b) prohibits the use of prior bad acts as propensity evidence. At trial, over defense objection, the trial court admitted evidence that Mr. Abram had an outstanding misdemeanor warrant to show motive of the offense of eluding a police officer. Did the trial court abuse its

discretion in admitting this highly prejudicial evidence regardless of whether Mr. Abram testified or not, and despite the lack of evidence showing that Mr. Abram had any knowledge of this misdemeanor warrant?

3. The use of the accused's silence at the time of arrest and after *Miranda* warnings have been given is fundamentally unfair and violates due process. Did the State violate these rights when it elicited evidence of Mr. Abram's post-*Miranda* silence as evidence of his guilt at trial?

4. Hearsay is inadmissible unless it meets one of the enumerated hearsay exceptions. Did the trial court's erroneous admission of hearsay statements that were used to undermine Mr. Abram's credibility prejudice him, and thus require reversal?

#### D. STATEMENT OF THE CASE

Adrian Abram drove to a grocery store in the very early morning to get diapers, wipes and batteries. RP 341. With him in the car were his three-year-old son and his girlfriend, Armita Sandoval. RP 341.

While Mr. Abram was in the check-out line, another customer inexplicably threatened him. As described by the store employee, Cameron Steffey, Mr. Abram was standing in line, "staring off into space," when the other customer started "freaking out," and accused Mr.

Abram of looking at him wrong. RP 321. The customer backed up, grabbed his hip and lifted his shirt several times as if he had a weapon. RP 321. He threatened Mr. Abram saying things like, "I could take you out. I'll take you anytime, anywhere. You can't handle me." RP 324.

Mr. Abram felt threatened. RP 344. The store is located in an unsafe part of town. RP 321. As Mr. Abram described, "this is the hood... there's a gang on every other street." RP 344.

To avoid a confrontation, Mr. Steffey let the threatening customer leave the store and had Mr. Abram wait inside for several minutes before returning to his car. RP 322.

When Mr. Abram went outside, he saw the customer sitting in his car in the parking lot. RP 345. Mr. Abram circled the parking lot several times, but the customer followed him in his car. RP 346. He told Ms. Sandoval to get down, cover up the baby, and he accelerated hard to get away from the customer before he returned home. RP 346, 355.

Mr. Abram left the parking lot and drove through a residential neighborhood. RP 200, 346. He did not know his exact speed, but at no point did he exceed the 80-miles-per-hour maximum speed of his 1994 Jeep Cherokee. RP 349, 358. There was little to no traffic. RP 206, 349. He slowed at intersections and corners to be sure he did not hit anyone. RP 249, 357.

At first, when Mr. Abram was fleeing from the customer who followed him, he noticed bright white lights behind him. RP 346, 347. When he got onto the freeway, he did not see the lights anymore, so he exited to go home. RP 348. His vehicle was disabled on the exit ramp by the police vehicle doing a “PIT”<sup>1</sup> stop on his vehicle. RP 249, 348.

Although the two officers in the police vehicle reported they followed Mr. Abram with flashing lights and a siren, neither Mr. Abram nor Ms. Sandoval heard the sirens over the loud engine of the aging 6.0 liter Jeep. RP 250, 334, 348. Ms. Sandoval had her head down, and Mr. Abram did not look back after first seeing the lights from the car of the customer who followed him out of the parking lot. RP 334, 346, 349.

Mr. Abram was charged with attempting to elude a police vehicle and driving while in suspended or revoked status in the first degree. CP 1-2. At trial, the officers testified they were in uniform in a marked patrol car, and they pursued Mr. Abram with lights and a siren as Mr. Abram drove above the speed limit through a residential neighborhood and then onto the highway. RP 199-212. Though he did not completely stop at stop signs

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<sup>1</sup> A “PIT” stop is a “pursuit interdiction technique” in which a vehicle approaches the rear fender of the other vehicle and intentionally causes the tires to rotate in the opposite direction, which causes the vehicle to spin out and momentarily shuts the motor down. RP 212, 272.

and lights, the streets were deserted and no one was injured. RP 201, 206, 366.

Mr. Abram was convicted as charged. CP 39-40.

E. ARGUMENT

**1. The court impermissibly encouraged the jury to give improper deference to police officer testimony when it erroneously provided an expert witness instruction and the court never qualified the police officers as experts.**

a. Deputies Maas and Nicodemus were not qualified as expert witnesses.

The offense of attempting to elude a police vehicle contains the element that the accused drive a vehicle in a “reckless manner” while attempting to elude a pursuing marked police vehicle. RCW 46.61.024 (1). Here, key to the prosecution establishing the elements of a “reckless manner” and eluding, was police officer testimony about the speed and manner in which Mr. Abram drove. To bolster the officers’ credibility, the prosecutor requested an expert witness instruction, even though the officers were never qualified as experts. RP 370.

To admit scientific or expert testimony under ER 702, the court must (1) qualify the witness as an expert; (2) the expert’s opinion must be based upon a theory generally accepted in the relevant scientific community, and (3) the testimony must be helpful to the trier of fact. *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003).

Officer Maas was a “patrol deputy,” whose main duty is to answer 911 calls. RP 193. He was trained at the police academy, where he learned “the basic rules of Washington State; traffic laws, domestic violence laws.” RP 192. Deputy Nicodemus also worked patrol, completed the police academy and field training, and was a field training officer. RP 263-264.

The officers testified about their observations of Mr. Abram’s driving, which included estimates of his speed. *See e.g.*, RP 199-212. This non-scientific, non-expert testimony on estimated speed is lay opinion. *State v. Kinard*, 39 Wn. App. 871, 874, 696 P.2d 603 (1985) (“A proper lay opinion would include the speed of a vehicle.”).

Moreover, neither officer presented evidence that the patrol car speedometer was properly calibrated and in good working order. By contrast, evidence of driving speed measured by a radar device requires expert testimony about the accuracy of the radar. *See City of Bellevue v. Mociulski*, 51 Wn. App. 855, 860–61, 756 P.2d 1320 (1988) (“The witness must first qualify as an expert via knowledge, skill, experience, training, or education. ER 702. After the witness has qualified as an expert, he/she must show that the machines passed the requisite tests and checks. Only then can the speed measuring devices be deemed reliable.”).

Here, the police officers presented only lay witness testimony, and the court was never asked to qualify the police officers as expert witnesses

where neither officer testified to specialized training regarding speed estimations or driving safety.

Despite the fact that the officers were not qualified as experts, and only testified as lay witnesses, the prosecution requested an instruction on expert witness testimony

Well, I don't know if they -- I think the police did -- the deputies in this case did provide testimony that relates to like an opinion about the speed that the defendant was going through the intersections and things like that whether or not he could safely clear intersections. I think that that is based on their training and experience and in motor vehicle operation and pursuit driving. Obviously the defendant has testified that he thought he was driving safely. So I think that could be considered an expert opinion in as much as they relied on their expertise.

RP 370. Over defense objection, the court instructed the jury as requested by the prosecution, noting that the jury could indeed find some of the officer testimony to be expert testimony:

I think that it may provide some information to the jury. While lay witnesses can testify about speed, I think that there's some additional experience and training that law enforcement officers have in regards to these situations. So I will give that instruction.

RP 370-371; CP 25. The court acknowledged that the officers' testimony regarding speed was lay opinion testimony, but nevertheless gave an expert witness instruction.

- b. Mr. Abram was prejudiced by the expert witness instruction because it gave undue deference to the officers' testimony.

To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010); *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993); *see* U.S. Const. amend. XIV; Const. art I, § 22. A misleading instruction requires reversal when it prejudices the complaining party. *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010) (citing *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)). A challenge to a jury instruction is reviewed de novo, and the instruction is evaluated “in the context of the instructions as a whole.” *State v. Knutz*, 161 Wn. App. 395, 403, 253 P.3d 437 (2011).

Courts must take special care to distinguish between expert testimony and non-expert testimony provided by testifying police officers, because of the concern that “an agent's status as an expert could lend him unmerited credibility when testifying as a percipient witness...” *United States v. Torralba-Mendia*, 784 F.3d 652, 658 (9th Cir. 2015) (quoting *United States v. Vera*, 770 F.3d 1232, 1242 (9th Cir. 2014)). This is why clarification is necessary where officers offer both lay and expert witness testimony at trial. “[i]f jurors are aware of the witness’s dual roles,’ the jury ‘must be instructed about what the attendant circumstances are in

allowing a government case agent to testify as an expert.” *Vera*, 770 F.3d at 1242 (quoting *United States v. Freeman*, 498 F.3d 893, 904 (9th Cir. 2007)).

Such confusion between an officer’s expert opinion and lay opinion is certain to occur where, as here, the officers were not in fact qualified as experts, but the court nonetheless gives an expert witness instruction. This situation exemplifies the Ninth Circuit’s concern that a jury will give improper deference to a police officer’s testimony as an expert in matters for which he is not in fact qualified to offer expert testimony. *See Vera*, 770 F.3d at 1246 (Had the court instructed the jury that the officer’s lay opinion testimony was “not based on scientific, technical, or other specialized knowledge,” it would have deterred the jury from viewing his opinions as having the “imprimatur of scientific or technical validity.”).

As noted by the prosecution, the officers and Mr. Abram gave differing accounts of their speed and driving, and credibility was a big part of the case. RP 370, 420. It was thus a question for the jury about whose account to believe. The officers expressed various opinions about how Mr. Abram’s driving demonstrated that he was attempting to elude. For example, Deputy Maas opined the only reason Mr. Abram would drive as he did was to elude the officers:

Q. Why would somebody turn their lights off during a

pursuit, in your experience?

A. My only thought for them to do be doing that would be hoping that it would make it so we would lose sight of them or quit chasing them.

Q. Does that increase the amount of danger of a collision with other vehicles when they turn their lights off?

A. Yes. RP 236.

He also expressed the unsubstantiated opinion that the siren would be “audible within the Cherokee.” RP 237.

Likewise, Deputy Nicodemus opined on Mr. Abram’s state of mind: “He was definitely trying to avoid me.” RP 273. And despite the lack of pedestrian or vehicular traffic, the deputy posited that he was not “safely” clearing intersections.” RP 272.

The inclusion of the expert witness instruction impermissibly and prejudicially directed the jury to lend “unmerited credibility” to the entirety of the lay testimony by the officers. *See Torralba-Mendia*, 784 F.3d at 658 (quoting *Vera*, 770 F.3d at 1246) (“[I]n light of our Circuit’s clearly expressed concerns about case agents testifying in both lay and expert capacities, the district court’s failure to give an instruction explaining [the agent’s] dual roles was plain error.”).

A jury is presumed to follow the court’s instructions. *State v. Wiebe*, 195 Wn. App. 252, 256, 377 P.3d 290, 293, *review denied*, 186 Wn. 2d 1030, 385 P.3d 122 (2016) (citing *State v. Kirkman*, 159 Wn.2d 918, 928,

155 P.3d 125 (2007)). Thus it must be presumed here that the jury in fact granted deference to the police as “a witness with special training, education, or experience,” without the deputies ever having been qualified to offer opinion testimony. CP 25.

Instructing the jury to grant expert witness status to non-expert police testimony prejudiced Mr. Abram, where the jury was charged with assessing witness credibility, and witness credibility was the central issue. The trial court thus erroneously directed the jury to defer to police officer testimony. Reversal is required.

**2. The trial court committed reversible error when it admitted evidence of Mr. Abram’s misdemeanor warrant as motive for eluding, where there was no evidence that Mr. Abram was aware of an outstanding misdemeanor warrant.**

- a. There was no evidence that Mr. Abram knew about an outstanding misdemeanor warrant at the time of the alleged offense.

The prosecutor sought to introduce evidence of an outstanding misdemeanor warrant as motive for Mr. Abram attempting to elude. RP 170. Over defense objection, the court determined the probative value of the outstanding warrant to show Mr. Abram’s “mindset” outweighed the prejudice, regardless of whether he testified at trial. RP 171-173.

ER 404(b) provides “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

conformity therewith.” However, “when demonstrated,” such evidence may be admissible for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Before a trial court admits evidence under ER 404(b), it must “(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *State v. Gunderson*, 181 Wn. 2d 916, 923, 337 P.3d 1090 (2014) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

A court's ruling on ER 404(b) evidence is reviewed for an abuse of discretion. *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008), *as amended* (May 20, 2008) (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)). In close cases, the balance must be tipped in favor of the defendant. *Id.*

“[M]otive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act.” *State v. Mee*, 168 Wn. App. 144, 157, 275 P.3d 1192 (2012) (citing *Powell*, 126 Wn.2d at 259).

At a pre-trial hearing, the officer testified that he ran Mr. Abram's record at the scene of the stop and found the warrant, but the deputy did not ask Mr. Abram whether he knew about the warrant at the time of the stop. RP 8/23/16; 34; RP 223. Moreover, at the pre-trial hearing and at trial, Mr. Abram was never asked whether he was aware of the warrant.

There was thus no evidence that Mr. Abram had any knowledge of this outstanding misdemeanor warrant that could have demonstrated an "impulse, desire," or "moving power" which caused him to act. *See Mee* at 157. Without a showing that the warrant could have provided any such motive, this absence of probative value is necessarily outweighed by the prejudice. Absent any probative value, the trial court abused its discretion in admitting evidence of the warrant.

b. Evidence of the outstanding warrant prejudiced Mr. Abram.

Erroneously admitted evidence requires reversal if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Wilson*, 144 Wn. App. at 178 (citing *Smith*, 106 Wn.2d at 780) (quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

Mr. Abram testified he believed he was being pursued by the threatening customer. RP 355, 356. To refute Mr. Abram's account, the

prosecution argued during closing that the misdemeanor warrant was Mr. Abram's motive for eluding police, despite the complete lack of evidence Mr. Abram was aware of the warrant. RP 391, 423. Evidence of the warrant is precisely the sort of propensity evidence that ER 404(b) prohibits because the jury would use it to infer that Mr. Abram is a person who disobeys police and court orders. This is particularly damaging because of the nature of the charge, attempting to elude a police vehicle.

In the absence of any evidence Mr. Abram was motivated to elude police because of the warrant, evidence of the warrant was nothing more than impermissible and highly prejudicial propensity evidence that affected the jury's perception of him. Reversal is required.

**3. The State impermissibly elicited evidence of Mr. Abram's post-*Miranda* silence as evidence of guilt.**

- a. Mr. Abram was entitled to remain silent after being advised of his *Miranda*<sup>2</sup> rights.

*Miranda* warnings "constitute an 'implicit assurance' to the defendant that silence in the face of the State's accusations carries no penalty." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S.Ct. 1710, 1716–17, 123 L.Ed.2d 353 (1993)). Thus, comments on this right to remain

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct 1602, 16 L.Ed.2d 694 (1966).

silent at the time of arrest and after the *Miranda* warnings is fundamentally unfair and violates due process. *Id.*

The State should not draw attention to a defendant's exercise of the constitutional right to silence. *State v. Burke*, 163 Wn.2d 204, 225, 181 P.3d 1 (2008). It is constitutional error for the State to purposefully elicit testimony about the defendant's silence. *State v. Romero*, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002) (citing *Easter*, 130 Wn.2d at 236). Thus, a police witness may not comment on the silence of the accused so as to infer guilt from a refusal to answer questions. *Id.* (citing *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996)).

- b. The State's elicitation of Mr. Abram's post-*Miranda* silence by the officer was constitutional error.

*Romero* suggested a "two-part analytical framework for determining whether a State agent's direct or indirect comments during trial on a defendant's silence amount to constitutional error." *State v. Terry*, 181 Wn. App. 880, 891, 328 P.3d 932 (2014) (citing *Romero*, 113 Wn. App. at 790–91). If, as here, the comment was not direct, *Romero* suggested three questions from which to determine whether the State was seeking to capitalize on an *inference* of guilt in a manner violating the defendant's rights:

First, could the comment reasonably be considered purposeful, meaning responsive to the State's questioning, with even slight

inferable prejudice to the defendant's claim of silence? Second, could the comment reasonably be considered unresponsive to a question posed by either examiner, but in the context of the defense, the volunteered comment can reasonably be considered as either (a) given for the purpose of attempting to prejudice the defense, or (b) resulting in the unintended effect of likely prejudice to the defense? Third, was the indirect comment exploited by the State during the course of the trial, including argument, in an apparent attempt to prejudice the defense offered by the defendant?

Answering “yes” to any of the questions means the indirect comment is an error of constitutional proportions.

*Id.* at 791.

Here, the answer is “yes,” to the first question. At the pre-trial hearing, the State ascertained that Mr. Abram waived his *Miranda* rights, but remained silent in response to several of the officer’s questions. RP 8/23/2016; 19, 22.

Then at trial, the State impermissibly elicited this testimony about Mr. Abram’s exercise of his constitutional right to remain silent pursuant to police questioning.

Q. Did you ever confront Mr. Abram about how close you were and there being no car between you?

A. Yes. And he would just decline to answer those ones.

RP 222-223. Mr. Abram’s silence must be read “in the face of police questioning,” as, “quite expressive as to the person's intent to invoke the right” *Easter*, 130 Wn.2d at 239.

This constitutional error can only be considered harmless “if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” *Terry*, 181 Wn. App. at 894 (quoting *Burke*, 163 Wn.2d at 222). Where Mr. Abram testified at trial and provided his own account of events, the evidence implicating guilt from his silence must be seen to have affected the verdict of any reasonable jury, because it was used to undermine his credibility. Thus, reversal is required.

**4. The court’s erroneous admission of Ms. Sandoval’s hearsay statements at trial prejudiced Mr. Abram.**

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). “Unless an exception or exclusion applies, hearsay is inadmissible.” *State v. Hudlow*, 182 Wn. App. 266, 278, 331 P.3d 90, 96 (2014); ER 802. Whether a statement is hearsay is reviewed de novo. *Id.* at 281.

The confrontation clause provides that: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend VI. It “bars ‘admission of testimonial statements of a witness who did not appear at trial unless he

was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”” *State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

- a. Ms. Sandoval’s statements were inadmissible hearsay and violated the confrontation clause.

Over defense objection, the prosecutor was permitted to elicit police officer testimony regarding statements made by Ms. Sandoval at the scene of the stop. RP 221-223.

Deputy Maas testified on direct:

Q: Did she ever mention there being another vehicle pursuing them besides you?”

A: No.

[...]

Q: Did she ever answer any of your questions initially?

A. Initially she stated that they were at Safeway. He told her that he got in an argument with somebody; and when they left Safeway, we got behind him.

RP 223. The prosecution again elicited Ms. Sandoval’s testimony on redirect.

Q: Did you ask her about whether she knew that there was a police car behind them?

A. Yes.

Q: To the best of your recollection, what exactly did she say about that?

A. She stated that -- basically all she would say is that once they left Safeway, we got behind them and he just didn't stop when we turned our lights on.

RP 260-261.

Ms. Sandoval's testimonial statements were introduced without the State calling her as a witness. RP 326. They were classic hearsay statements to show the truth of the matter asserted—that Mr. Abram eluded police.

The State did not, and indeed could not argue that any of the hearsay exceptions applied, where her statements were made in response to officer questioning. *See* ER 803 (a)(1-3).

Nor can it be argued that these are nonhearsay statements. Though out-of-court declarations made to a law enforcement officer may be admitted to demonstrate an officer's state of mind, this is true "only if [his] state of mind is relevant to a material issue in the case; otherwise, such declarations are hearsay." *Hudlow*, 182 Wn. App. at 278 (citing *State v. Johnson*, 61 Wn. App. 539, 545, 811 P.2d 687 (1991)). However, Ms. Sandoval's state of mind was irrelevant to whether Mr. Abram was attempting to elude the officers. The only *relevant* use of the inadmissible hearsay was for the truth of the statement, because there was no question of why police began their investigation. *Hudlow*, 182 Wn. App. at 280 (citing *State v. Edwards*, 131 Wn. App. 611, 128 P.3d 631 (2006) ("the detective's motive for starting his investigation 'was not an issue in controversy.'")).

The error was not cured by Ms. Sandoval's later testimony. *State v. Sua*, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003) (“an out-of-court statement is hearsay when offered to prove the truth of the matter asserted—even if it was made by someone who is now an in-court witness.”).

Absent any identified exception to the rule against hearsay or permissible nonhearsay basis for admission of her statements, Ms. Sandoval's out of court statements were erroneously admitted to show the truth of the matter asserted, and violated Mr. Abram's right to confront and cross-examine witnesses against him.

- a. Admission of Ms. Sandoval's statements prejudiced Mr. Abram because it required him to undertake the burden of rebutting the erroneously admitted statements.

The erroneous admission of hearsay is not harmless error when, within reasonable probabilities, the improper evidence affected the outcome of the trial. *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 690–91, 370 P.3d 989 (2016). Likewise, confrontation clause violations require reversal unless the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error. *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011).

It was not harmless error here, where Ms. Sandoval's erroneously admitted out-of-court statements implicated Mr. Abram, and he was prejudicially forced to take on the burden of refuting her statements by calling her as a witness at trial.

Both the defense and the State originally included Ms. Sandoval on their witness lists. RP 96. But neither the defense nor the State had an opportunity to talk to Ms. Sandoval prior to trial, so neither party knew whether they would call her. RP 309. The defense then called her as a witness after the State had introduced her damaging statements. RP 326-327. The defense questioned her about the hearsay statements, which she denied making. RP 331-332. Because of this inadmissible hearsay, the defense had to call a witness it might not have otherwise elected to call to rebut the highly damaging inadmissible statements. Because the error was not harmless, reversal is warranted. *See Edwards*, 131 Wn. App. at 616 (Court reverses where improper admission of hearsay was not harmless).

#### F. CONCLUSION

Mr. Abram was prejudiced by a jury instruction that impermissibly gave deference to officer testimony. He was also prejudiced by the improper use of ER 404(b) evidence, comment on his post-*Miranda* silence, and the erroneous admission of Ms. Sandoval's out of court statements that implicated Mr. Abram and required him to undertake the

additional burden of refuting her statements. These errors, individually and cumulatively,<sup>3</sup> violated Mr. Abram's constitutional right to due process and his right to a fair trial. Reversal is required.

DATED this 15th day of June, 2017.

Respectfully submitted,

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<sup>3</sup> *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (Cumulative error applies to instances where there are "several trial errors" when combined, deny the accused a fair trial.).

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 49882-1-II
v.	)	
	)	
ADRIAN ABRAM III,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF JUNE, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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# WASHINGTON APPELLATE PROJECT

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